

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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JAMES VIERA, : 17-CV-00523-WES-PAS
Plaintiff,

-against- : United States Courthouse
: Providence, Rhode Island

BAYVIEW LOAN SERVICING, : Monday, November 13, 2017
LLC, et al., : 11:00 a.m.
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR A TRO HEARING
BEFORE THE HONORABLE JOHN J. MCCONNELL, JR.
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiff: JOHN B. ENNIS, ESQ.
1200 Reservoir Avenue
Cranston, Rhode Island 02920
BY: JOHN B. ENNIS, ESQ.

For the Defendants: MICHENZIE & SAWIN, LLC
745 Boylston Street, 5th Floor
Boston, Massachusetts 02116
BY: AMY MAGHER, ESQ.

Court Reporter: Lisa Schwam, CRR, RPR, RMR
Official Court Reporter

Proceedings recorded by computerized stenography. Transcript
produced by Computer-Aided Transcription.

1 (In-chambers telephone conference)

2 THE COURT: Good morning, folks.

3 MR. ENNIS: Good morning, Judge.

4 MS. MAGHER: Good morning, your Honor.

5 THE COURT: We're on the record so why don't
6 counsel identify themselves, please.

7 MR. ENNIS: John Ennis representing the
8 plaintiff.

9 MS. MAGHER: Good morning, your Honor. Amy
10 Magher representing Bayview Loan Servicing and Bank of
11 New York Mellon. I should let your Honor know, I also
12 have two colleagues in my office with me. We had a
13 flurry of documents come in this morning and I was in
14 the car. I didn't know whether we'd be in Rhode Island
15 or not. They have kindly helped me prepare for this.

16 THE COURT: Well, thank you to all of you. And
17 thank you particularly for those that scurried around
18 this morning to allow this hearing to take place.

19 I think I just told you that we are on the
20 record. This is Judge Smith's case. Judge Smith is
21 out sitting with the Ninth Circuit in California this
22 week so the Clerk's Office asked me to handle it in his
23 absence because I understand that a foreclosure has
24 been scheduled for 2 o'clock today.

25 I've had a brief chance to review the complaint

1 and, John, my take is that the crux of the complaint is
2 a failure to comply with paragraph 22 of the mortgage
3 notice requirements?

4 MR. ENNIS: Yes, Judge. We believe that the
5 default notice was not proper, and it's undisputed that
6 no acceleration notice was ever sent. And based upon
7 the October 16th, 2017, monthly statement, the loan has
8 not been accelerated. We believe, based upon the
9 mortgage and the note, there has to be an acceleration
10 before you exercise statutory power of sale.

11 THE COURT: Amy.

12 MS. MAGHER: Your Honor, we disagree that there
13 is no argument that there was a notice of acceleration
14 sent. If your Honor takes a look at Exhibit B of
15 plaintiff's filing, there's a notice of default and
16 intent to accelerate. And that letter contained every
17 element required of paragraph 22 of the mortgage, every
18 single element required of paragraph 22 of the
19 mortgage, which has been submitted as Plaintiff's
20 Exhibit A, your Honor.

21 THE COURT: John, have you matched up the
22 Exhibit B, which is ECF2-2 that Amy suggested that I
23 look at, against the paragraph 22 notice requirement?

24 MR. ENNIS: Yes, your Honor. It doesn't state
25 that the failure to cure may result in acceleration of

1 the debt. It specifically states that if the default
2 is not cured, BLS will take steps to terminate the
3 ownership of the property. They do talk about the
4 right to bring a court action, but they do not -- they
5 add items that are not required and are not
6 specifically authorized. For example, they say unless
7 you notify us within 30 days that you dispute the
8 validity of this debt, we will assume the debt is
9 valid. And they indicated that they --

10 THE COURT: John, let me stop you for a second.
11 What is it that -- well, two questions. What is it
12 that would disallow the mortgagee from including
13 additional information in there? I mean, I don't
14 remember anything in any mortgage document that would
15 exclude their ability to say something else. That's
16 question one.

17 And question two is, you know, so what that they
18 said that's what they're going to assume. I mean, you
19 know, if they're right to assume that according to the
20 law, so be it, but don't they have every right to
21 assume whatever they want?

22 MR. ENNIS: No, they do, but by adding certain
23 things stating that it will be -- they will take action
24 is different than they may take action.

25 THE COURT: Hold on for a second, John. Wait a

1 minute. I just want to deal with each one while I'm
2 thinking of it because we're doing this somewhat on the
3 fly.

4 Isn't "may take action" subsumed in "will take
5 action"? In other words, it's not the opposite where
6 they're supposed to say they will and they say may. If
7 they say will and what they're supposed to say is may,
8 isn't that inclusive of it in terms of the purpose of
9 the notice requirement?

10 MR. ENNIS: No, because then the "may" indicates
11 there has to be a subsequent communication indicating
12 what the -- not just the arrearages. There's no
13 dispute that they listed an arrearage amount. They
14 said it had to be -- twice they said it had to be cured
15 by 9-7-17. Now, I cited the Supreme Court case in
16 Rhode Island that identified the term "by" as
17 synonymous with "on" or "before," and I think the *HEDCO*
18 cases in Rhode Island talk about specific dates.

19 MS. MAGHER: Your honor, can I just jump in for
20 just a second?

21 THE COURT: Sure.

22 MS. MAGHER: I apologize as your Honor wanted to
23 take these issue by issue. I think it's relevant to
24 point out to your Honor that the letter states verbatim
25 what's required in paragraph 22, again stating failure

1 to cure the default on or before this date may result
2 in acceleration of the funds secured by the security
3 instrument.

4 THE COURT: Okay.

5 MS. MAGHER: That's at the top of page 2 of the
6 actual Exhibit B, but as to the electronic filing, it's
7 actually page 3 of 4.

8 THE COURT: Got it. Thanks.

9 MR. ENNIS: And the "may" language comes in
10 because the "may," when you read the notice, indicates
11 that something else is needed because you're allowed to
12 reinstate within five days after acceleration. There
13 has been no acceleration in here, Judge. There is no
14 documentation that indicates it's been accelerated.

15 THE COURT: Hold on one second, John.

16 Amy, where is the acceleration?

17 MS. MAGHER: There's no requirement, your Honor,
18 that they send any subsequent separate acceleration
19 notice as counsel is suggesting that they have to.
20 Very specifically in paragraph 22, which is part of
21 Exhibit A -- I'm sorry, I'm trying to find it.

22 I'm sorry, your Honor. If you'd just give me
23 one moment, please.

24 THE COURT: Sure. I'm reading from paragraph 22
25 which, for the record, is at ECF2-1 at page 12 of the

1 filings. And it says, "Lender shall give notice to
2 borrower prior to acceleration." And it looks like
3 that's what the Exhibit B notice does. It tells the
4 borrower that the bank intends to accelerate.

5 What requires them to actually accelerate prior
6 to the foreclosure and does that have notice
7 requirements?

8 MR. ENNIS: It does, Judge. If you look at
9 paragraph 10 of the note, it talks about the security
10 instrument describes how and what -- under what
11 conditions I may be required to make immediate payment
12 in full of all amounts I owe under this note. Some of
13 those conditions may be described as follows. And
14 later on they state, "If lender exercises this option,
15 lender shall give borrower notice of acceleration."

16 MS. MAGHER: No, Judge, that's not required. In
17 fact, your Honor, it says -- page 12 of 15, the third
18 line from the bottom, "If the default" -- sorry, it
19 starts actually at the fourth line from the bottom.

20 THE COURT: Folks, hold on. I don't -- where is
21 the note?

22 MR. ENNIS: The note, I believe, is Exhibit F.

23 MS. MAGHER: This is in the mortgage, your
24 Honor, not the note.

25 MR. ENNIS: Well, I'm reading the note

1 references uniform secured note.

2 THE COURT: Okay. John, before we get to Amy's
3 point, tell me where you're reading from in the note.

4 MR. ENNIS: Paragraph 10.

5 THE COURT: Okay. This note at Exhibit F of --

6 MR. ENNIS: My complaint.

7 THE COURT: -- is only one page of the
8 complaint.

9 Okay. Got it.

10 MR. ENNIS: Do you have that?

11 THE COURT: I don't have it, but why don't you
12 talk me through it and then I'll see if I need to get a
13 copy. I only have the motion and the attachments.

14 MR. ENNIS: Okay. The affidavit contained, I
15 think it was, Exhibit F. I'm reading from uniform
16 secured note. That security instrument describes how
17 and under what conditions I may be required to make
18 immediate payment in full of all amounts I owe under
19 this note. Some of these conditions are described as
20 follows. And then that third paragraph states, "If
21 lender exercises this option, lender shall give
22 borrower notice of acceleration. The notice shall
23 provide a period of not less than 30 days from the date
24 this notice is given in accordance with Section 15
25 within which borrower must pay all sums secured by the

1 security instrument. If borrower fails to pay these
2 sums prior to the expiration of a period, lender may
3 invoke any remedies permitted by the security
4 instrument without further notice or demand to
5 borrower."

6 THE COURT: Okay. Amy, where do you get
7 acceleration?

8 MS. MAGHER: That -- first of all, let's deal
9 with counsel's issue. That paragraph that he's
10 referring to refers to the paragraph above which is if
11 any or all or part of the property are sold or
12 transferred. That's not the circumstance at issue
13 here.

14 What we're dealing with here --

15 THE COURT: Okay. Well, my question to you,
16 Amy, was where did the mortgagee accelerate? My
17 understanding of the scenario is that an intent to
18 accelerate has to be given and then an acceleration has
19 to take place which then also kicks in a certain time
20 period.

21 Where is the acceleration in this?

22 MS. MAGHER: With respect to the Court, that is
23 not what is required to foreclose under a security
24 instrument. There is a -- paragraph 22 doesn't require
25 that, and there's no statutory requirement for a second

1 acceleration notice.

2 THE COURT: Well, but there's no acceleration
3 notice here. There's an intent to accelerate. I can't
4 imagine that it would require someone to tell them that
5 they intend to accelerate but then not tell them that
6 they have accelerated.

7 MS. MAGHER: In fact, that is correct, your
8 Honor. If you'll look at Exhibit A of the mortgage on
9 page 12 of 15, ending at the fourth line from the
10 bottom reads as follows: "If the default is not cured
11 on or before the date specified in the notice, lender
12 at its option may require immediate payment in full of
13 all sums secured by this security instrument without
14 further demand and may invoke the statutory power of
15 sale."

16 MR. ENNIS: The further demand relates to the
17 note in the arrearage portion. On paragraph 19 of the
18 mortgage it talks about borrower's right to reinstate
19 after acceleration. And it talks about if borrower
20 meets certain conditions, borrower shall have the right
21 to have enforcement of this security instrument, which
22 is foreclosure, discontinued at any time prior to the
23 earliest of, five days before the sale. And then it
24 goes down to -- and it talks about after acceleration.
25 But the conditions are borrower pays lender all sums

1 which then would be due under the security instrument
2 and the note as if no acceleration had occurred.

3 So it appears that it's an essential portion of
4 the process that you have a default notice that you
5 have 30 days to cure. And after that an acceleration
6 notice gets sent which declares the entire loan payable
7 in full. And you have a right after the acceleration,
8 if you get it all cured, it gives you even more time.
9 For example, at the end of paragraph 19 it states,
10 "Upon reinstatement by borrower, the security
11 instrument and obligations secured hereby shall remain
12 fully effective as if no acceleration had occurred."

13 That is in the mortgage. So it would seem
14 essential as an acceleration. The most recent
15 statement that the client has received indicates that
16 no acceleration has been done.

17 MS. MAGHER: That's not accurate at all.
18 Because they have the right to reinstate, they get a
19 notice of sale so they are aware that the foreclosure
20 is happening. They can reinstate at any time up
21 through the time of sale.

22 MR. ENNIS: There is no document indicating that
23 the loan has been accelerated.

24 MS. MAGHER: It isn't required by paragraph 22
25 or Rhode Island law.

1 THE COURT: Amy, we can only have one speaking
2 at a time because the court reporter is having
3 difficulties.

4 MS. MAGHER: Sorry. I apologize, your Honor.

5 THE COURT: Go ahead.

6 MS. MAGHER: Who, me?

7 THE COURT: Sure.

8 MS. MAGHER: Sorry. There is not any further
9 notification required; paragraph 22 makes that quite
10 clear. Every element required in paragraph 22 is
11 contained within the notice of default and intent to
12 accelerate. The borrower has until the date specified
13 in the notice to cure the default. If they don't, they
14 may, the lender may, accelerate without further notice.
15 That's what paragraph 22 says.

16 Then the mortgagor gets notice of sale, and they
17 have the right to reinstate at any time prior to the
18 sale. Then, continued statement, they have to provide
19 those because, as your Honor well knows, the amount
20 that is due under the secured instruments are -- it
21 changes day to day, especially this time of year.
22 There are taxes to be paid, there's interest that
23 accrues and other types of fees.

24 THE COURT: John, did you want to say something
25 finally?

1 MR. ENNIS: Well, once again, the statement does
2 not indicate that the loan has been accelerated. That
3 was done after the notices were sent. It's dated
4 October 16th. It's Exhibit C.

5 The loan has not been accelerated, and there is
6 no document indicating that it's been accelerated.
7 They may accelerate it. Paragraph 22 says prior to
8 acceleration which implicitly, if not explicitly,
9 suggests that you have to have an acceleration. There
10 is no document here that indicates the amount that is
11 totally due.

12 THE COURT: So let me stop everyone and tell you
13 where we are. I'm going to grant the temporary
14 restraining order. I think all of the elements needed
15 for an injunction are present. On the issue which
16 we've been discussing for the last 10 or 15 minutes
17 about likelihood of success, while my review of the
18 material is very cursory just because of the timing of
19 this, the foreclosure that's about to take place in a
20 couple hours and we just got this this morning, but
21 from my past experience with a docket of 1200 mortgage
22 cases, my understanding was that a notice that
23 acceleration of the mortgage was required. At least
24 paragraph 19 of the mortgage appears to require that
25 the mortgagor receive notice of that acceleration in

1 order to be able to effectuate their rights to
2 reinstate after acceleration.

3 It doesn't appear that there's been any notice
4 of acceleration to the mortgagee in this case. And,
5 therefore, it may not be ripe for foreclosure. And
6 irreparable harm I believe would come to the plaintiff
7 in this matter should a foreclosure be allowed to take
8 place and in effect a standstill will not enure to
9 anyone's great prejudice conditioning the equities of
10 the case.

11 So I'm going to grant the TRO and send this case
12 back to Judge Smith.

13 MR. ENNIS: Thank you, Judge.

14 THE COURT: Thanks, folks.

15 MS. MAGHER: Thank you, your Honor.

16 (Time noted: 11:18 a.m.)

17 (Proceedings adjourned)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Official Court Reporter

May 16, 2018